No. 83-1164

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD JACK PHILLIPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the admission into evidence of five address books found by DEA agents in the course of executing arrest warrants for petitioner and his co-defendants violated petitioner's Fourth Amendment rights.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 593 F.2d 553.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1978. The court of appeals entered an order vacating, withdrawing, and reissuing the mandate on October 14, 1983. See note 1, *infra*. A petition for rehearing was denied on November 16, 1983 (Pet. App. 1b-2b). The petition for a writ of certiorari was filed on January 12, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on a total of 16 counts of conspiracy to distribute heroin and

cocaine, in violation of 21 U.S.C. 846; use of a telephone to facilitate distribution of narcotics, in violation of 21 U.S.C. 843(b); interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952; and operation of a continuing criminal enterprise, in violation of 21 U.S.C. 848. He was sentenced to a total of 22 years' imprisonment and a $50,000 fine. The court of appeals affirmed (Pet. App. 1a-23a).[1]

1. The evidence at trial established that petitioner operated a massive scheme, involving at least 47 named co-conspirators, to distribute narcotics in California, Michigan, Ohio, Pennsylvania, West Virginia, Maryland, and Washington, D.C. From his base in Los Angeles, petitioner directed the wholesale distribution of the narcotics to subordinates throughout the country, who in turn sold the drugs to retailers and to purchasers on the street. Tr. 233-236.

2. Prior to trial, the district court denied the motion of petitioner and his co-defendants to suppress evidence of five address books seized by government agents in the course of executing arrest warrants for petitioner and several of his co-conspirators. Evidence at a suppression hearing established that DEA agents executed arrest warrants for two of petitioner's co-conspirators, Terry Speech and Crystal

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[1]The judgment of the court of appeals was entered on December 6, 1978. In March 1981 petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. (Supp. V) 2255, alleging, inter alia, that he had been denied his Sixth Amendment right to effective assistance of counsel because his appellate counsel had failed to inform him of his right to petition for a rehearing in the court of appeals and of his right to petition this Court for a writ of certiorari. In August 1983, following a series of proceedings in the district court and the court of appeals, petitioner filed a motion to recall the mandate of affirmance in the court of appeals. In October 1983, the court of appeals granted petitioner's motion to recall the mandate (*United States* v. *Phillips*, No. 77-2353 (4th Cir. Oct. 14, 1983)). Petitioner then filed a petition for rehearing, which the court of appeals denied (Pet. App. 1b-2b).

Overton, at an apartment located on Redlands Street in Los Angeles. After they were admitted to the apartment, the agents arrested Speech and Overton and searched the apartment for petitioner, whom they believed was living there and for whom they also had an arrest warrant. While searching the second floor, an agent saw and seized an address book lying on a night stand in the master bedroom. Pet. App. 7a-8a; Tr. 7-9, 132-135.

Having failed to find petitioner at the Redlands Street address, the DEA agents went to an apartment on 20th Street that they had identified as a gathering place used by petitioner and his co-conspirators. The agents knocked on the door and announced their presence and purpose, but heard no response. Agents stationed at the rear of the apartment heard noises emanating from the second floor of the apartment. The agents then forced their way into the apartment, secured the premises, and searched for anyone who might be present. Pet. App. 9a-10a. In the course of the search, an agent seized what "was obviously an address book" (Tr. 21) lying on a television stand in a room on the second floor. The book appeared similar to those seized by other DEA agents earlier in the course of the investigation. The agents found no one in the apartment. It appeared that the noise they had heard came from a radio. Pet. App. 9a-11a; Tr. 9-10, 136.

On the same day, DEA agents in Ypsilanti, Michigan went to an apartment to execute a warrant for the arrest of petitioner and Roberta Shaw, a co-defendant. An agent knocked on the door, announced his purpose, and was admitted to the apartment by Shaw. Another agent searched the apartment for other conspirators known to frequent the residence and located petitioner in one of the bedrooms. The agents arrested petitioner and Shaw, advised them of their constitutional rights, and told them they would be taken to the federal building in Detroit. Since Shaw was not

dressed, an agent followed her into the master bedroom and told her to pick out the clothes she would wear. She selected clothes and dressed in the bathroom after the agents checked for weapons. An agent then accompanied Shaw to the living room, and another agent escorted petitioner to the bedroom to dress. Petitioner asked the agent to choose clothes because petitioner's wrist and thumb were broken. The agent selected a sweater, slacks, shoes, socks and a jacket. Another agent removed the jacket from the hanger and searched it for weapons. The agent discovered a telephone address book in the jacket and seized it. After petitioner returned to the living room, an agent asked Shaw to "get her purse, or anything she might want to take downtown." Shaw walked into the bedroom, accompanied by an agent, and picked up a large pocketbook. The agent seized two black telephone books when he saw Shaw transferring them from the pocketbook to a smaller purse. Pet. App. 16a; Tr. 149-155, 163, 180.

3. On appeal, petitioner contended that the district court erred in denying his motion to suppress the address books. The court of appeals held (Pet. App. 9a, 14a-15a) that the introduction into evidence at trial of the address books seized at the Michigan apartment and at the Redlands Street address in Los Angeles did not violate petitioner's Fourth Amendment rights because the seizures of the books were justified under the "plain view" doctrine articulated in the opinion for the plurality in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-467 (1971). The court of appeals rejected petitioner's claim that the seizure of the address book from the second Los Angeles apartment resulted from an unlawful forced entry (Pet. App. 14a-15a). The court also held that, in any event, the evidence of the guilt of petitioner and his co-defendants was so overwhelming that any possible error in admitting the book seized from the

second apartment was harmless beyond a reasonable doubt (*id.* at 15a-16a).[2]

ARGUMENT

Petitioner contends that the address books seized at the two Los Angeles apartments and the Michigan address were improperly admitted into evidence at trial, because the seizures did not meet either the search incident to arrest exception or the plain view exception to the warrant requirement. Both courts below correctly resolved these fact-bound claims against petitioner. No further review is warranted.[3]

1. Petitioner first contends (Pet. 9-16) that the searches of his jacket and articles Shaw removed from her pocketbook following their arrests at the Michigan apartment did not fall within the search incident to arrest exception. We

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[2]In addition, the court of appeals rejected various other claims raised by petitioner and his co-defendants (Pet. App. 17a-23a).

[3]Petitioner's long delay in seeking certiorari constitutes an additional reason for concluding that review is unwarranted. The petition was filed over five years after the court of appeals' decision affirming petitioner's conviction. Petitioner's claim is therefore in essence a collateral attack on his conviction, one that goes not to his guilt or innocence but to whether the exclusionary rule should have been applied to keep out admittedly relevant evidence. In view of the long delay, "the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force." *Stone* v. *Powell*, 428 U.S. 465, 494-495 (1976) (footnote omitted).

The court of appeals appears to have granted petitioner's motion to recall and reissue the mandate based on his contention that his counsel's failure to advise him of his right to petition for rehearing in the court of appeals and of his right to petition this Court for a writ of certiorari deprived him of his Sixth Amendment right to effective assistance of counsel. See note 1, *supra*. Although the United States Attorney did not oppose petitioner's motion, we note that this Court's decision in *Wainwright* v. *Torna*, 455 U.S. 586 (1982)(per curiam), would appear to require rejection of petitioner's Sixth Amendment claim.

note at the outset that petitioner has no "standing" to challenge the seizure of the items Shaw removed from her pocketbook, since he has not demonstrated that he had any expectation of privacy in the contents of her pocketbook. See *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-106 (1980); *United States* v. *Salvucci*, 448 U.S. 83 (1980); *Rakas* v. *Illinois*, 439 U.S. 128 (1978).

In any event, the courts below properly concluded that the searches at the Michigan apartment were incident to the arrests of petitioner and Shaw. Petitioner does not suggest that agents knew the location of the address books and thus used the selection of his jacket as a pretext for discovery of the address book it contained. And by petitioner's own account (Pet. 7), the agents simply suggested that Shaw might wish to take a smaller purse with her. There is no indication that the agents knew what Shaw's pocketbook contained. There can be no dispute that the agents could have lawfully seized the address books from petitioner and Shaw when they were processed at the federal building. See *Illinois* v. *Lafayette*, No. 81-1859 (June 20, 1983), slip op. 6. Petitioner can hardly complain that the address books were seized somewhat earlier in the course of searches that were of minimal intrusiveness (see slip op. 5). In any event, it is settled that officers may search clothing worn by an arrested person (*United States* v. *Edwards*, 415 U.S. 800 (1974)), including coat pockets (*United States* v. *Campbell*, 575 F.2d 505, 507-508 (5th Cir. 1978); *United States* v. *Smith*, 565 F.2d 292, 294 (4th Cir. 1977)) and purses (*United States* v. *Brown*, 671 F.2d 585, 586-587 (D.C. Cir. 1982); *United States* v. *Moreno*, 569 F.2d 1049, 1052 (9th Cir.), cert. denied, 435 U.S. 972 (1978)). Thus, the searches at issue here were entirely proper.

Contrary to petitioner's claim (Pet. 14-15), the address books had immediate and obvious evidentiary value to the agents, who were well aware that petitioner and Shaw were

participants in a large interstate drug conspiracy that used telephones for communication. In view of their knowledge and experience (see *United States* v. *Cortez*, 449 U.S. 411, 418 (1981)), the agents were certainly justified in recognizing that the address books had evidentiary significance.

2. Petitioner also contends that the seizures of the address books in Los Angeles were not justified by the "plain view" exception to the warrant requirement. Petitioner first claims (Pet. 17-21) that the seizure of the address book found at the 20th Street apartment was unjustified because the agents used unlawful force to enter the apartment. Petitioner concedes (*id.* at 18) that the officers would have been justified in forcing their way into the apartment if, after having given notice of their authority and purpose, they received no response and reasonably believed the apartment was occupied. He maintains, however, that the courts below erred in concluding that the officers reasonably believed someone was inside the apartment. But at the time they arrived at the 20th Street apartment, the agents knew that petitioner and his co-conspirators used the apartment as a gathering place, and they also knew that petitioner was not at his usual residence (the Redlands Street address) that morning. Thus, when the agents heard a noise coming from the apartment, they could reasonably have concluded that petitioner or a co-conspirator might have been attempting to conceal their presence. Under those circumstances the agents were justified in using force to enter the apartment. See *United States* v. *Tolliver*, 665 F.2d 1005, 1007-1008 (11th Cir.), cert. denied, 456 U.S. 935 (1982); *United States* v. *Jackson*, 585 F.2d 653, 662 (4th Cir. 1978); *United States* v. *Allende*, 486 F.2d 1351, 1352-1353 (9th Cir. 1973), cert. denied, 416 U.S. 958 (1974).[4]

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[4]Moreover, as the court of appeals held (Pet. App. 15a-16a), even if the address book seized at the 20th Street apartment were wrongly introduced into evidence, any error arising from its admission was clearly harmless in view of the overwhelming evidence against petitioner. See note 5, *infra*.

Petitioner also claims (Pet. 21-23) that the agents' discovery of the address book at the Redlands apartment was not "inadvertent," as required under the plain view doctrine. But the agents clearly had a right to be in the apartment in order to execute an arrest warrant and to see whether anyone else might have been in the residence. As this Court recently noted in discussing the plain view doctrine, "our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately." *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 8 (plurality opinion (citations omitted)). There is no suggestion here that the officers used the arrest warrant as a pretext to search for evidence of petitioner's drug trafficking. Thus, the "inadvertence" prong of the plain view doctrine was satisfied. See slip op. 6.

Contrary to petitioner's contention (Pet. 23-30), this case meets the requirement that the evidentiary value of the seized item be "immediately apparent" to police (*Texas* v. *Brown*, slip op. 6). Following the court of appeals' decision, this Court denied certiorari in a case in which one of petitioner's co-defendants raised a similar claim. *Speech* v. *United States*, 441 U.S. 947 (1979). As we pointed out in our brief in opposition in *Speech*, because the agents were dealing with a large conspiracy that routinely used telephones in transacting its business, an address book belonging to a co-conspirator was almost certain to contain incriminating evidence. This common sense understanding of the officers' knowledge is consistent with the probable cause standard and meets the requirements of the plain view doctrine. See *Texas* v. *Brown*, slip op. 10-11.[5]

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[5]In any event, any error in admitting the address books was harmless beyond a reasonable doubt. See *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 9. As the court of appeals recognized (Pet. App.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1984

15a), the evidence against petitioner was overwhelming. Several participants in the conspiracy testified at trial that petitioner had recruited others to join the narcotics organization, instructed them in the mechanics of drug distribution and, along with one other conspirator, controlled the operation (Tr. 198-381, 735-810, 835, 871, 971-982, 1064-1068, 1083-1088, 1351-1366, 1381-1384, 1394-1395, 1396-1397, 1399, 1413-1414, 1437-1441, 1442-1443, 1972-1975, 2028-2031). One witness testified that petitioner had told her he had made three million dollars in the drug business (Tr. 1447). Intercepted telephone conversations between petitioner and others about the drug operation were also introduced at trial (Tr. 1940, 1950, 1957, 1970). Petitioner himself testified at trial and admitted he had been involved in the drug operation (Tr. 2801-2819). Thus, introduction of the evidence of the address books listing telephone numbers of certain co-conspirators was cumulative and did not add in any significant way to the overwhelming evidence of petitioner's guilt.